

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT PATRICK HERNANDEZ,
Petitioner.

No. 2 CA-CR 2016-0138-PR
Filed July 6, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20131446001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Erin E. Duffy, P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly¹ concurred.

M I L L E R, Judge:

¶1 Robert Hernandez petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Hernandez pled guilty to attempted aggravated assault with a deadly weapon or dangerous instrument and possession of a deadly weapon by a prohibited possessor. The trial court imposed consecutive, presumptive, 2.5-year prison terms. The charges stemmed from an incident in March 2013 when Hernandez accused the victim of stealing a "quad" from him and threatened him with a firearm outside a home the victim was visiting. Hernandez, a convicted felon who was prohibited from possessing a weapon, admitted having consumed "12 to 18 beers" on the night of the offense.

¶3 At the change-of-plea hearing, the trial court incorporated the grand jury transcript, a fact which was also noted in the written plea agreement. That transcript indicated that, after the attempted aggravated assault, the owner of the home where Hernandez was staying, which was "across the street" from the location of the incident, consented to a search of his home. That

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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search yielded a black Glock handgun “in the area where Mr. Hernandez was sleeping.”

¶4 The author of the presentence report stated that the incident took place at approximately 11:25 p.m., and in its ruling denying Hernandez’s motion to suppress the gun, the court found the search, initiated “[s]hortly after midnight,” had yielded a gun “[n]ear the area where [Hernandez] had been sleeping.” See *State v. Brooks*, 120 Ariz. 458, 461, 586 P.2d 1270, 1273 (1978) (court may consider “record as a whole,” including presentence report, to determine whether factual basis supports guilty plea). And in his motion to suppress the gun, Hernandez stated that the search occurred “at approximately 1:30 [a.m.]” on the evening of the incident and acknowledged that the gun was found in his “private sleeping area” in the home. See *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) (factual basis for guilty plea “may be derived from any part of the record including presentence reports, preliminary hearing transcripts, or admissions of the defendant”).

¶5 The plea agreement included the following special terms: “No agreement between the parties as to whether sentences in Counts One & Two are to run consecutively or concurrent[ly].” At the change-of-plea hearing, the trial court asked Hernandez if he understood that it was up to the court whether to impose concurrent or consecutive sentences, to which Hernandez responded, “Yes, sir, I do.” The presentence report stated: “No agreement between the parties as to whether sentences in Counts One and Two are to run consecutively or concurrent.” And at sentencing, the court again referred to its sentencing discretion, without objection, before imposing consecutive terms.

¶6 Hernandez filed a petition for post-conviction relief. He argued the imposition of consecutive sentences violated A.R.S. § 13-116, the statutory prohibition against double punishment, because his convictions stemmed from the same conduct, and he asked that concurrent sentences be imposed instead. The trial court summarily dismissed the petition. It found that Hernandez had waived his claim by agreeing that consecutive sentences could be imposed and that there was no sentencing error pursuant to § 13-116 because two

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of the three factors under *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989), had been satisfied. This petition for review followed.

¶7 On review, Hernandez argues the trial court's imposition of consecutive prison terms violated § 13-116 because both offenses occurred at the same time and arose from the same act.² Section 13-116 provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Accordingly, under § 13-116, "a trial court may not impose consecutive sentences for the same act." *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). We review de novo whether consecutive sentences are permissible under § 13-116. *Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d at 1179.

¶8 To determine whether a defendant's conduct constituted a single act and whether consecutive sentences are permitted, we apply the three-part analysis provided in *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. We focus our inquiry on the facts "to determine if the defendant committed a single act." *State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002). In applying the *Gordon* test to this case, we begin by determining whether attempted aggravated assault or weapons misconduct was the ultimate crime. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. As the trial court correctly found, and Hernandez agreed, attempted aggravated

²To the extent Hernandez raises arguments based on double jeopardy and fundamental error for the first time on review, we do not consider them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). In any event, because we conclude the trial court properly imposed consecutive sentences, double jeopardy is not implicated. *See State v. Eagle*, 196 Ariz. 27, ¶ 21, 992 P.2d 1122, 1126-27 (App. 1998) (double jeopardy implicated only when "same act or transaction" violates two distinct criminal statutes). We similarly decline to address the court's finding that Hernandez waived his § 13-116 claim.

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assault is the more serious crime and thus is the ultimate crime under the facts of this case. *See id.*

¶9 Next, we eliminate the evidence necessary to sustain the conviction for attempted aggravated assault and determine whether the remaining evidence supports the offense of weapons misconduct. *See id.* A person commits attempted aggravated assault by “[i]ntentionally placing another person in reasonable apprehension of imminent physical injury” using “a deadly weapon or dangerous instrument.” A.R.S. §§ 13-1203(A)(1), 13-1204(A)(2). Criminal attempt occurs when a person, acting with the culpability required to commit an offense, “[i]ntentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be.” A.R.S. § 13-1001(A)(1). Misconduct involving weapons includes knowingly possessing a deadly weapon or prohibited weapon if the defendant is a prohibited possessor; that is, a person “[w]ho has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” A.R.S. §§ 13-3101(A)(7)(b), 13-3102(A)(4). Subtracting the evidence necessary to convict Hernandez of attempted aggravated assault—that he used the gun to commit that offense—the fact remains that he was previously convicted of a felony and had no right to possess a firearm.

¶10 Notably, the record establishes that after Hernandez committed attempted aggravated assault using the prohibited weapon, he continued to possess the gun later “that night” in the home where he had been sleeping.³ Because Hernandez, a prohibited possessor, retained the gun after the attempted

³To the extent Hernandez argues on review that the trial court erred in relying on information other than that provided at the change-of-plea hearing, to wit, information contained in the grand jury transcript or in the presentence report, we reject this argument. *See Salinas*, 181 Ariz. at 106, 887 P.2d at 987; *Brooks*, 120 Ariz. at 461, 586 P.2d at 1273.

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aggravated assault was complete, this conduct alone weighs in favor of permitting consecutive sentences. *See Urquidez*, 213 Ariz. 50, ¶ 8, 138 P.3d at 1179 (aggravated assault and prohibited weapons charges separate for purposes of imposing consecutive sentences).

¶11 The second *Gordon* factor examines whether it was factually possible for Hernandez to commit attempted aggravated assault against the victim without also committing the weapons misconduct offense. Hernandez correctly points out, as the trial court found, that it was factually impossible for him, a convicted felon, to commit attempted aggravated assault with a deadly weapon without having used a gun as a prohibited possessor. *Cf. id.* ¶ 9. Accordingly, we next consider the third *Gordon* factor.⁴

¶12 That factor examines whether Hernandez's conduct in committing the weapons misconduct offense caused the victim to suffer an additional risk of harm. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Evidence in the record established that Hernandez retained possession of the gun after the attempted aggravated assault was complete. *See Urquidez*, 213 Ariz. 50, ¶ 10, 138 P.3d at 1179-80. And the trial court here reasonably could and did infer that Hernandez's continued possession of the gun increased the risk of additional possible harm to the victim.⁵ We agree and thus find the third factor was met.

⁴*See Urquidez*, 213 Ariz. 50, ¶ 9, 130 P.3d at 1179 (court proceeded to final *Gordon* factor because analysis of first and second factors was not determinative); *cf. State v. Price*, 218 Ariz. 311, n.5, 183 P.3d 1279, 1284 n.5 (App. 2008) (rejecting argument that *Gordon* analysis may end after analyzing only first factor); *Siddle*, 202 Ariz. 512, ¶ 18, 47 P.3d at 1156 (analyzing all three factors where first and second yielded contradictory results).

⁵The trial court further noted that Hernandez "was just across the street from the victim and his family prior to the altercation," the gun likely was accessible to Hernandez during this time when "he also consumed alcohol," and "[t]he armed and intoxicated Petitioner also had some mistaken belief that the victim had stolen the quad

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¶13 Because the offenses Hernandez committed were based on multiple acts occurring at separate and distinct times, the trial court was not required to impose concurrent sentences pursuant to § 13-116. *Cf. State v. Cruz*, 127 Ariz. 33, 35-36, 617 P.2d 1149, 1151-52 (1980) (possession of gun and deadly assault by prisoner were separate acts because defendant had “completed the crime of possession prior to the assault offense”). Accordingly, we grant review but deny relief.

vehicle in question for some period of time prior to actually confronting the victim.”